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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 173

MOUND COMPANY,

Petitioner,

v.

THE TEXAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit for the special and substantial reason that the Court of Appeals has decided an important Texas question in a way in conflict with applicable Texas law, and in a way in conflict with its own decisions as to the applicable Texas law, with the decided question controlling the judgment in this action to determine whether Petitioner validly terminated a lease on Texas land as to oil and gas. The Court of Appeals (Judge Rives dissenting), in affirming

the District Court judgment that there was no valid termination, has failed to mention, to discuss, to distinguish, to attempt to distinguish or even to consider decisions by the Texas courts or its own recent prior decisions establishing Texas mineral lease law applicable in lease termination cases involving Texas land, even though such decisions are governing under the undisputed facts of this case.

In this Petition the record from the court below will be referred to as "R" and the Appendix to this Petition will be referred to as "App".

Opinion Below

The District Court, without written opinion, made findings of fact and conclusions of law upon which it entered judgment for Respondent (R. 433-437). The Opinion of the Court of Appeals, affirming the District Court, is reported as *Mound Company* v. *The Texas Company* at 298 F. 2d 905 (1962). It is contained in the record (R. 595-607) and is appended hereto (App. 4).

The action was for declaratory judgment that Petitioner as lessor had validly terminated the Texas lease as to oil and gas because Respondent as lessee had started drilling or prospecting for oil but had not continued to drill at the time intervals which the lease required once prospecting operations for oil had begun. The issue is whether the uncontroverted evidence established that Respondent did begin "prospecting operations * * * with respect to oil". If so, Petitioner was entitled to judgment. A majority of the three-judge panel of the Court of Appeals, with Judge Rives dissenting, held that Respondent Texaco had not commenced prospecting or drilling for oil under the lease because wells in which Respondent Texaco admittedly explored for, and in at least two instances found oil, were holes drilled by Freeport Sulphur Company, as Respond-

ent's sulphur sublessee, in which such sublessee also explored for sulphur. In deciding the question of whether Respondent Texaco had commenced prospecting or drilling for oil, the Court of Appeals opinion refused to charge or credit Respondent with the actions of its sulphur sublessee in the drilling of the holes in which Respondent searched for and found oil and in which its sulphur sublessee searched for sulphur even though under the undisputed evidence all of the actions of the sulphur sublessee were pursuant to the sublease and were with the agreement, procurement, payment and participation of the Respondent.

Two members of the three judge panel of the Court of Appeals sitting in the case held in the opinion "that the trial court could find that the contract required something more than was actually done here to trigger the 30-day clause", i.e., the provision of the lease amendment requiring the Respondent to continue drilling without more than thirty day intervals between wells once prospecting operations for oil had begun, and further held "that the trial court could find as a fact that the lessee did not intend to start on a bona fide effort to discover oil". The consequence of the holding is that the Respondent may sit on this valuable oil and gas lease until 1986 without any further drilling or development for the benefit of Petitioner as the land owner.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on February 1, 1962 (App. 1, R. 608). Petitioner's first petition for rehearing was denied on March 27, 1962 (App. 2, R. 677). Petitioner's second petition for rehearing and motion for rehearing en banc were denied on April 27, 1962 (App. 3, R. 697). The jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

Questions Presented

(1) Is the holding of the Court of Appeals that Respondent would not be charged or credited with the drilling by its sulphur profit-sharing sublessee of the holes in which Respondent as oil and gas lessee explored for oil, in deciding the question of whether the lessee commenced "prospecting operations * * * with respect to oil", in conflict with Texas law as declared in *Willson* v. *Superior Oil Company*, Tex. Civ. App., 274 S.W. 2d 947, error refused n.r.e. (1955) and by its own decisions in *Mattison* v. *Trotti*, 262 F. 2d 339 (1959) and *Sinclair Oil & Gas Co.* v. *Masterson*, 271 F. 2d 310 (1959), cert. den. 363 U.S. 952 (1960)?

(2) Can a Texas oil, gas and sulphur lessee conduct a search for oil by the usual, customary and accepted methods normally employed in the oil and gas industry, i.e., the utilization of electric logs and side wall cores, in nine wells and discover oil in at least two of them, and still sustain a finding under Texas law that it has not begun "prospecting operations * * * with respect to oil" or started "drilling for oil" because the holes in which the explorations for oil were made had been bored by its sulphur sublessee and because the sulphur sublessee explored for sulphur in the same wells, even though under the uncontroverted evidence all of the activities of the sulphur sublessee in the drilling of the wells and in the operations conducted in the wells were under agreement with and with the participation, procurement and payment of the lessee?

Statement of the Case

This diversity-of-citizenship action was brought by Petitioner, Mound Company, against Respondent, The Texas Company, in the District Court for the Southern District of Texas seeking a declaratory judgment that a lease for

oil, gas and sulphur purposes executed in 1915 by Petitioner, as lessor, to Respondent's predecessor, as lessee (R. 460), had terminated as to oil and gas pursuant to the provisions of an amendment to the lease which was executed under date of January 1, 1942 (R. 515). The lease covered a tract of 2500 acres and a tract of 500 acres in Brazoria County, Texas. The 2500-acre tract, known as Hoskins Mound, overlies a shallow salt dome of the piercement type common to the coastal plain adjacent to the Gulf of Mexico in Texas and Louisiana.

In 1922 Respondent entered into a contract, actually a sublease, with Freeport Sulphur Company for the development of sulphur under the lease on a profit-sharing basis (R. 476) pursuant to which Respondent was receiving during all times pertinent to this case seventy percent of the sulphur profits (R. 483-484). Under the profit-sharing agreement Respondent has received over $58,000,000 from the sale of vast quantities of sulphur produced by Freeport under the lease (R. 161). Thus, Respondent, after the execution of its profit-sharing agreement with Freeport, owned the predominant financial interest in the lease rights as to sulphur and owned all of the oil and gas lease rights.

The sole question in this case is whether the lessee in 1950 commenced prospecting operations for oil with the use of a suitable drilling rig in a bona fide effort to discover oil as required and provided in the 1942 amendment, the controlling language of which is as follows:

"ARTICLE II

"It is agreed that ARTICLE SECOND of said oil, gas and mineral lease from Mound Company to . . . [Texaco] dated May 22, 1915, shall be amended to read as follows:

"'(a) On a date not later than that on which the lessee surrenders its right to mine sulphur from the Mound Company 3,000 acres and thereby is released from the obligation to make any further advance sulphur royalty payments, the lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work with due diligence, in a bona fide effort to discover oil, until oil or gas is discovered in paying quantities on the Mound Company 3,000 acres or until the lessee shall have drilled to the depth herein stipulated .... If any time after drilling for oil has been started and before oil or gas is discovered in paying quantities on the Mound Company 3,000 acres, should the lessee permit more than thirty (30) days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, the lessor may at its option, unless such delay beyond thirty (30) days is caused by act of God or conditions wholly beyond the control of the lessee, terminate this lease, as to oil and gas, as to the Mound Company 3,000 acres.'"

Thus, prospecting or drilling for oil, once begun by the lessee, had to be continued without an interval of more than thirty days between wells until there was a discovery of oil or gas in paying quantities, and in the event of a longer interval the lessor had the right to terminate the lease as to oil and gas. It is the contention of the Petitioner that, under the undisputed facts, activities by Respondent (including activities by its sulphur sublessee with which Respondent is charged) constituted a prospecting or drilling for oil within the meaning of the above quoted provision and that as a consequence of the cessation of such operations without the discovery of oil or gas, lessor's notice of termination (R. 543) effectively terminated the lease as to oil and gas.

With sulphur deposits at Hoskins Mound nearing depletion in late 1949, Texaco and Freeport entered into a contract (R. 558) to drill a seismic well near the center of the salt dome and to conduct a seismic refraction survey in the well for the purpose of outlining the configuration of the salt mass, delineating the caprock and locating the flanks of the dome. Texaco joined in the program to get information for "*future drilling operations for oil*" (R. 554) and "*in connection with the possibility of conducting prospecting for oil and gas at Hoskins Mound*" (R. 558). It was then known to Texaco and contemplated by Texaco and Freeport that a number of flank wells would be located and drilled on the basis of the information obtained from the proposed refraction survey (R. 380, 381). The cost of drilling this joint seismic well to a depth of 3500 feet and running the seismic refraction survey above that depth was to be shared equally by Texaco and Freeport. While Freeport was interested only in sulphur, which it would expect to encounter commercially only at caprock, Texaco was interested both above caprock and below caprock — where oil and gas but not sulphur might be anticipated. Accordingly, Texaco initiated the negotiations which resulted in the agreement to drill the seismic well beyond 3500 feet to approximately 8,000 feet at the sole cost of Texaco both for drilling and the refraction survey below 3500 feet (R. 141-143). Texaco entered into a separate contract with McCollum Exploration Company, the company making the seismic survey above 3500 feet, for the running of the seismic survey below the depth of 3500 feet (R. 555). Texaco and Freeport were both to receive the seismic survey report to the depth of 3500 feet, but only Texaco was to receive the McCollum report for the depths below 3500 feet.

The joint seismic survey project was completed with Texaco paying some $32,000 as its portion of the cost of

drilling the seismic well and of the seismic survey above 3500 feet. Texaco paid McCollum $11,000 as the total cost of the seismic survey below 3500 feet (R. 141-143). In addition Texaco furnished certain heavy drilling equipment needed in the drilling of the well below approximately 3600 feet (R. 142).

The resulting reports of the refraction survey (Plaintiff's Exhibits 15-A through Q) served their two purposes for Texaco. First, the concluding paragraph of the report from McCollum Exploration to Texaco confirmed that

> *"The flanks of the dome and areas of overhang should offer numerous traps for the accumulation of oil and gas* * * *". (Emphasis supplied)

Second, the contemplated flank wells were spotted around the flanks of the dome as revealed by the refraction survey at locations selected by putting the information contained in the refraction survey to its intended use.

Proceeding as originally contemplated, Texaco and Freeport, immediately after the refraction survey was concluded and its results interpreted, executed a contract concerning the flank well program and Texaco's prospecting for oil and gas in the flank wells (R. 562), to which was attached a map of Hoskins Mound upon which the proposed flank well locations were encircled in red. Texaco inspected this map and approved these locations as suitable for its purposes (R. 389, 390). Under the agreement Texaco was to take over the flank wells after caprock had been reached and run electric logs and take sidewall cores in the wells. Texaco was to pay delay rig time to Freeport and to bear the entire risk of any damage resulting from or occurring during the take-over of the wells by it. Under the undisputed evidence, a joint flank well program was agreed upon under which Freeport would prospect for sulphur under the profit-

sharing sublease for the benefit of itself and Texaco, and Texaco would prospect for oil and gas, in a series of flank wells which would encircle approximately two-thirds of the perimeter of the salt dome and be drilled at places shown by the refraction survey to be good "traps" for oil and gas.

The program was carried out. The nine flank wells were drilled. In these exploratory flank wells Texaco first searched for oil and gas *above the caprock*, where oil and gas but not sulphur might be found, and then Freeport set casing and searched for sulphur *in the caprock*, where it might be found, in a comprehensive joint program which thoroughly explored the flanks of the salt dome for oil, gas and sulphur in a series of wells drilled "by the lessee" under the lease around approximately two-thirds of the perimeter of the dome (R. 338, 367).

Texaco was kept informed as to the progress of drilling in the flank wells (R. 564), and a notice procedure was established so that a Texaco petroleum engineer would be available on the wells at the proper time to take over the wells and to supervise the running of electric logs and the taking of sidewall cores (R. 565).

Texaco ordered and paid for electric logs run by Halliburton Oil Well Cementing Company in the nine wells. The electric logs indicated to Texaco personnel the probable presence of hydrocarbons in six of the wells and Texaco ordered and paid for sidewall cores in those wells. Halliburton took the cores at the coring points designated by Texaco after Texaco's examination of the electric logs and Texaco's selection of the points at which hydrocarbons were probably present (R. 143-147, 391). In every instance an authorized and qualified Texaco petroleum engineer or geologist was present on the wells, representing Texaco in signing for and supervising the work, examining field prints of the electric logs on the ground, determining from an

examination of the log whether sidewall cores should be taken, designating the points at which they were to be taken, and taking possession of the cores. (R. 147-154, 373). The sidewall cores recovered by Halliburton and delivered to Texaco were examined and described by a qualified and authorized Texaco paleontologist and the descriptions of the cores were noted upon the electric logs themselves as well as on individual core reports for each well (R. 154-157).

Plaintiff's Exhibits 20 through 28 (R. 567-575) are the electric logs and Plaintiff's Exhibits 29 through 34 (R. 576-581) are the sidewall core descriptions. These logs and core descriptions establish beyond question Texaco's thorough and extensive prospecting for oil and gas above the caprock at Hoskins Mound.

Electric logs and sidewall cores are not only the usual and accepted means employed in exploring for hydrocarbons in almost all oil and gas wells, but such is substantially their exclusive use (R. 400-401).[1] While electric logs and sidewall cores are used extensively in oil and gas explorations, they are not normally used in a search for sulphur (R. 168, 286). The record shows that of the more than one

[1] Electric logs are made by lowering an instrument into an open drilled hole prior to the setting of the casing. The instrument produces a series of curves on a strip of paper from and by which an expert interpreter may determine the characteristics of the strata through which the well has passed and the probable contents of the strata. A particular type of "kick" or flaring away of certain of the curves on the log is identified when observed by the trained interpreter as a favorable indication of the presence of producible hydrocarbons at the point or points in the well where such "kicks" or flares occur. To confirm the presence or absence of hydrocarbons in the stratum at which the favorable indication occurs, it is common practice in the oil and gas industry to take a sidewall core at such point. Such core is a small piece of soil from the wall of the well, which, after its recovery, can be handled, visually examined, smelled, and subjected to certain tests, e.g., exposure to a fluorescent light and immersion of a portion of it is in a solution of ether or other solvent to determine whether oil is actually present in the core. It is common in the oil industry for the examiner of the core to record his findings on what is known as a core description (R. 164, 165, 320).

thousand wells which Freeport drilled at Hoskins Mound electric logs and sidewall cores had not been taken in any of them, other than in the nine flank wells (R. 375-379). Electric logs are usual and ordinary procedures in drilling and prospecting for oil and gas and, according to the witnesses, were used in some ninety-five percent of the wells drilled for oil and gas on the Texas Gulf Coast (R. 165-166, 321). Electric logs and sidewall cores are commonly used and were in 1950 commonly used in drilling and prospecting for oil and gas on the flanks of salt domes such as Hoskins Mound (R. 167-168, 321).

The electric logs and sidewall core descriptions for Wells 1017 and 1028 established that oil was present in those wells and that Texaco found it. This is undisputed. Texaco's own expert witness concurred in this uncontroverted fact (R. 404-405). A Texaco employee declared the discovery and presence of oil in Well 1017 by writing "Oil Sd." on the electric log at a depth just below 2400 feet in that well (R. 568). The core description at that point (R. 576) described the core as having "fine grain", "good odor" (which meant odor of oil (R. 188, 328)), "good fluorescence" (which meant that oil was present (R. 189, 329)), and "light golden brown" color, which meant to the industry that when the core was exposed to a solvent it had an oil color (R. 189). Core description for Well 1028 showed the oil present and discovered in at least three strata (R. 578, 282, 293-294, 331-332). The core description for Well 1025 showed an indication of oil (R. 577).[2] The other core descriptions con-

[2] Striking significance should be attached to the fact that Texaco labeled the electric logs of the three wells in which oil was discovered by it, i.e., wells 1017, 1025 and 1028, "Confidential. Not to be released" (Plaintiff's Exhibits 21, 22 and 23; R. 568-570) but that the electric logs of the other three wells in which sidewall cores were taken *and in which oil was found to be absent were not so labeled* (Plaintiff's Exhibits 24, 26, and 27, R. 571, 573, 574; Plaintiff's Exhibits 32, 33 and 34, R. 579-584 being the logs and core descriptions on wells 1034, 1044 and 1047).

cluded with the expression "N.S." which in the oil industry means "no show", i.e., the absence of oil. In oil field terminology "no show" means that there has been exploration of the sub-surface strata in an oil well in a search for oil — a diligent effort to find oil — but that oil has not been found. Texaco's "shows" and "no shows" recorded on its core descriptions established both where oil was present and where oil was absent in the strata above caprock in an area covering two-thirds of the perimeter of Hoskins Mound.

In summary, electric logs were taken by Texaco in each of the nine wells, sidewall cores were taken by Texaco in six of them, and in three of them Texaco recorded that it had found oil.

It is physically possible to drill for oil, gas and sulphur simultaneously in a single bore hole (R. 267, 386-387). These nine flank wells had normal bore holes and were physically like any other oil wells. All that would have been required to complete either Well 1017 or 1028 as an oil well was to set casing and perforate it opposite an identified oil sand, install a production tubing string and wellhead equipment, and construct the necessary tanks to receive the oil (R. 197, 285-286, 335).

After learning of this prospecting for oil and gas conducted by Texaco in the nine flank wells, Mound Company gave written notice of its election to terminate the lease as to oil and gas in the 3000 acres, because prospecting and drilling for oil and gas had been commenced under the lease, but had not been continued as required by the 1942 amendment (Plaintiff's Exhibit No. 6, R. 543). This suit was filed (with requisite diversity of citizenship and jurisdictional amount) for a judgment declaring that the lease had been validly terminated as to oil and gas (R. 15). The District Court separated the actual physical operations

carried out by Texaco from those carried out by Freeport and, viewing them in isolation, found that Texaco had not drilled for oil (R. 433-436) and based thereon entered judgment for the defendant (R. 437, 438). The majority of the three judge panel affirmed these findings and this judgment. Judge Rives dissented and capsuled all that there is to this case in his first two sentences:

> "Both parties agree that the 1942 amendment defines 'drilling for oil' in terms of prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil. With that definition, it seems to me that the undisputed evidence established that drilling for oil was started".

Argument on the Reasons Why The Writ Should Be Granted

The activities and the operations of Texaco and Freeport in their entirety — the totality of the undisputed physical facts which occurred at Hoskins Mound — indisputably constituted a prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil, i.e., a "drilling for oil" as defined in Article II of the January 1, 1942 agreement. Only by the artificial device of separating integrated physical facts into hypothetical but nonexistent separate entities placed in imaginary different compartments, i.e., the Texaco activities and the Freeport activities, could the District Court and then the majority of the panel of the Court of Appeals decide that Texaco had not "drilled for oil". The District Court and the majority of the Court of Appeals panel held that Texaco did not prospect or drill for oil because Freeport carried out the drilling of the holes in which Texaco explored for oil and because Freeport searched for sulphur in the same holes. Each facet of this decision is contrary to the established law of the State of Texas.

Point One

The majority opinion and judgment of the Court of Appeals has decided an important question in a way in conflict with applicable law of the State of Texas as established in Willson v. Superior Oil Co., Tex. Civ. App., 274 S.W. 2d 947, error refused n.r.e. by the Supreme Court of Texas (1955) by deciding, contrary to that Texas case, that none of the actions of Respondent's sulphur sublessee in the drilling of the seismic well and in the drilling of and the operations conducted in the nine flank wells may be charged or attributed to Respondent (lessee), although the Texas law is that all of such actions of its sulphur sublessee are in law the actions of Respondent because under the undisputed evidence all of such activities were under agreement with and with the procurement, payment, and participation of the Respondent.

The question presented is an unusually important one to the jurisprudence of Texas and to its major industry, i.e., whether one mineral leasehold estate owner is to be charged or credited with the activities of another mineral leasehold estate owner on the same tract of Texas land in the drilling of wells and operations conducted therein when all of such activities, drilling, and operations were under agreement with and with the procurement, payment, and participation of the first mineral leasehold estate owner. The state courts of Texas have answered this question in the affirmative in the case of *Willson v. Superior Oil Company*, supra. The majority opinion and judgment of the Court of Appeals have answered the same question in the negative.

In the Willson case the Texas court held that the owner of a mineral leasehold estate covering a one-half interest in a tract of land could be credited with and get the benefit of the drilling of a well on the tract by the owner of a lease.

on the other one half interest because Superior Oil Company as the nondrilling lessee approved the drilling site, shared costs with the drilling lessee under a contract between them, and kept one of its engineers on location during the drilling by the drilling lessee. This participation by the non-drilling lessee under agreement with the drilling lessee was held to constitute the drilling of a well by Superior under the drilling obligation of its lease because the drilling by the drilling lessee "was the act of Appellee as well as the act of Jackson & Associates, and that the drilling and completion of the well in question and commercial production thereafter extended and kept the lease of Appellee in full force and effect". The facts are so closely parallel to those at bar as to render distinction insupportable, although there the non-drilling lessee was being *credited* with the activities of the drilling lessee, while the converse is true here in that Texaco should be *charged* with the activities of Freeport.

The *Willson* case declares at 274 S.W. 2d 950 that it is the only Texas case on the question, stating:

> "Neither Appellant nor Appellee has cited a Texas case in point on the principal question involved here and we have not found such a Texas case. Both parties, however, have cited an Oklahoma Supreme Court case, Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 87, 27 P. 2d 855, 91 ALR 188, which they contend is persuasive authority in their favor."

The rule of the *Earp* case was adopted and followed in the *Willson* case. The *Earp* case held that the owner of one mineral estate could claim the benefit of activities by the owner of another mineral estate on the same land where there was agreement by the non-drilling lessee in the activities and not merely "a passive and reluctant acquiescence". The Oklahoma court said:

> "Nor do we think that any particular form of agreement is essential to accomplish this result, it being sufficient if the lessee claiming the drilling operation as a compliance with the terms of his lease can rightfully say that the exploration and development of the premises is his act, in whole or in part. However, in order to claim the act of drilling as his own, it is obvious that there must be something more than a mere passive acquiescence in the drilling by another lessee under a separate lease".

It can be demonstrated from the face of the majority opinion that the rule of the *Willson* and *Earp* cases is applicable and governing and charges Texaco with all of the drilling activities and operations of Freeport in both the seismic well and the nine flank wells. That opinion concedes on page 5 (App. 8) that the seismic well was drilled under agreement between Texaco and its sulphur sublessee Freeport and with the procurement, payment, and participation of Texaco, viz.:

> "Thereupon, an agreement was made by the two companies by which Texaco was to receive all the data uncovered by the drilling to a depth of 3500 feet, for which it would reimburse Freeport for one-half the cost and it would pay Freeport for the entire cost of drilling below the 3500 foot level. It was not disputed that Texaco's objective in participating in this venture was to obtain information that might enable it to determine whether oil was present on the lease".

The majority opinion on page 6 (App. 8) further concedes the participation of Texaco in the flank well program and its payment for a part thereof but then sharply separates Freeport's activities from those of Texaco and views Texaco's individual activities in isolation, viz.:

> "These were located and drilled by Freeport to see if it could locate additional sulphur deposits. • • • Texaco agreed to pay the cost of its logging and coring work and to reimburse Freeport for 'delay rig time' caused by this work. Otherwise Freeport did the drilling at its expense. Nine of these wells were drilled by Freeport and they were electrically logged and corings were taken for the account of Texaco."

In refusing to charge Respondent with any of the activities of Freeport in the drilling of and operations in the nine flank wells, despite Texaco's agreement, payment, and participation, the majority opinion states at page 10 (App. 12):

> "The testimony was undisputed that Freeport Sulphur Company would have performed substantially all of these acts *whether or not Texaco joined in and shared some of the expenses*". (Emphasis supplied).

It must necessarily be conceded, and the majority would seem clearly to agree, that there would be a prospecting and drilling for oil at Hoskins Mound under the undisputed evidence so as to permit Mound Company to terminate the lease if Texaco alone had drilled and paid for the nine flank wells and had run electric logs and taken sidewall cores searching for oil and gas in the sedimentary beds above the caprock and had prospected in the caprock for sulphur. The majority opinion looks at the activities of Texaco in running the electric logs and taking the sidewall cores in isolation and states that these alone are not sufficient to compel a finding of prospecting and drilling for oil.

This decision is clearly contrary to the decision of the Texas Court of Civil Appeals in the Willson case which would view the activities of both Freeport and Texaco in their entirety (as if performed by Texaco alone) in determining from the totality of the integrated operations whether there had been a prospecting and drilling for oil

"by the lessee" at Hoskins Mound under the lease. This is true because the undisputed evidence establishes that all of the activities of Freeport were under agreement with and by procurement, payment,[3] and participation of Texaco.

Point Two

The majority opinion and judgment of the Court creates a conflict as to Texas law within the Fifth Circuit between such decision and previous decisions recently rendered by the Fifth United States Court of Appeals in Mattison v. Trotti, 262 F. 2d 339 (1959), and Sinclair Oil & Gas Co. v. Masterson, 271 F. 2d 310 (1959), certiorari denied, 363 U.S. 952, 4 L. Ed 2d 870 (1960), because such decisions, contrary to the present decision, would charge Respondent under Texas law with all of the activities of its sulphur sublessee in the drilling of and in the operations of the seismic well and the nine flank wells where under the undisputed evidence all of the activities of the sulphur sublessee were under agreement with and with the procurement, payment, and participation of the Respondent.

In *Mattison* v. *Trotti*, supra, the Fifth United States Court of Appeals cited and applied the principle of Texas law laid down in *Willson* v. *Superior Oil Co.*, supra, and *Earp* v. *Mid-Continent Petroleum Corporation*, supra., i.e., whether a non-drilling lessee can be credited or charged with drilling by the lessee of another mineral leasehold estate on the same tract of Texas land is to be determined

[3] Emphasis is due the fact that Texaco in reality *paid 70% of all costs of all operations performed by Freeport at Hoskins Mound* (including the drilling of the seismic well and the nine flank wells) by virtue of Texaco's ownership of 70% of gross sulphur receipts *after payment of operating costs* (Plaintiff's Exhibit 1-C, R. 476, 483-484) and the further fact that *Texaco in reality owned 70% of the equipment used by Freeport in the drilling of the seismic well and nine flank wells* (Plaintiff's Exhibit 4, R. 540).

by whether there was agreement, procurement, participation or payment by the non-drilling lessee in the activities of the drilling lessee. The non-drilling lessee was denied credit for a well drilled by the drilling lessee in that case because the well "was not induced or procured by Appellants, nor was it drilled under any agreement or understanding" between the non-drilling lessee and the drilling lessee. It is emphasized that the non-drilling lessee "did not pay, agree to pay, or in any way contribute to the cost of the well". In other words, the very facts were absent there which are present here so that the principle recognized there when applied here necessarily charges Texaco because of its agreement, procurement, participation, and payment with all of the activities of Freeport in the drilling of the flank wells and the operations conducted therein.

In *Sinclair Oil & Gas Co.* v. *Masterson*, supra, the question before the Fifth Circuit was whether or not the oil lessee of Texas land had complied with its obligation to prospect for oil on the leased premises. The oil lessee claimed that the drilling of wells by the gas lessee satisfied the obligation of the oil lessee to prospect for oil. The Court of Appeals held that there had been no prospecting for oil by the oil lessee when there was no agreement by the oil lessee with reference to or participation by the oil lessee in the drilling of the wells by the gas lessee and when the wells drilled by the gas lessee did not even explore the likely oil bearing strata but on the contrary the gas lessee "was diligent to avoid getting into any liquids whether oil or water, because of the difficulties in walling them off so as to prevent interference of the production of gas". It is inherent in the holding that had the undisputed facts shown as they do here a participation by the oil lessee by agreement or payment in connection with the drilling of the wells by gas lessee, the drilling of such wells through

the oil producing sands, the turning over of the wells to the oil lessee for testing of such sands, the actual testing of such sands for oil, and the actual discovery of oil in some of the wells, it would have been held by the Court to have been prospecting for oil by the oil lessee.

The majority opinion and the judgment of the Court of Appeals have created doubt, uncertainty and confusion on the important question of whether the owner of one interest in the mineral leasehold estate may be credited with or charged with the drilling or other activities of the owner of another interest in the mineral leasehold estate in the same tract of Texas land by agreement, payment and participation, because the majority opinion refuses to charge Respondent as the oil and gas lessee with the drilling and other activities of its sulphur sublessee to which it agreed, to which it contributed and in which it participated, without discussing or even citing the Texas decision and the two decisions of the Fifth Circuit which hold to the contrary.

Conclusion

Article Second of the lease, as amended, contains no provision with reference to production or intention to produce oil. It relates only to "prospecting operations * * * in a bona fide effort *to discover oil*". It does not deal with *drilling to produce*. Production is governed entirely by Article Third (R. 522). The Court of Appeals has equated the starting by the lessee of the "drilling for oil" (in the sanctions provision of paragraph (a) of Article Second as amended) with the commencement of "prospecting for oil" with the use of "a suitable drilling rig" in a "bona fide effort to discover oil" (in the obligation provisions of that paragraph). Under that equation the uncontroverted facts

equal "drilling for oil" because it is uncontroverted that oil was discovered in at least two of the nine flank wells under the lease, that it was discovered in the course of an effort by Texaco to find it, that the effort was bona fide, that the effort was continued with diligence, and that there was a prospecting for oil with the use of a suitable drilling rig. These objective facts are not and cannot be disputed. The decision of the majority of the Court of Appeals panel that there was no prospecting or drilling for oil by Texaco is therefore "so clearly erroneous as to cause the ruling of the Court * * * to rest upon nothing more substantial than the power * * * arbitrarily to disregard established facts". *Chesapeake & Ohio Railway Company* v. *Martin*, 283 U.S. 209 (1931).

The *Willson*, *Earp*, *Trotti*, and *Masterson* cases tear down the impenetrable wall which the majority opinion seeks to erect between Texaco and Freeport. Under the doctrine of these cases, and under Texas law as announced and applied in three of them, Texaco is charged with the drilling of the nine flank wells as a consequence of its several agreements with Freeport, its direct and individual activities in and about the seismic well and the nine flank wells, its payments to Freeport and its bearing and sharing of other costs in connection with said operations. The majority opinion fails to cite any of the four cases.

Texaco commenced "prospecting operations * * * with respect to oil" and actually found oil in these wells. It accordingly started "drilling for oil"; and thereafter stopped, so as to give Mound Company the option to terminate the lease, which right it exercised. This case as so aptly characterized by Judge Rives in his dissenting opinion is "that simple".

It is accordingly urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

.....

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APPENDIX

JUDGMENT.

Extract from the Minutes of February 1, 1962

MOUND COMPANY,

No. 18910

versus

THE TEXAS COMPANY.

This cause came on to be heard on the transcript of the record from the United States Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Mound Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents."

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FILED

27 day of March 1962

Clara R. James

Clerk of the United States Court of Appeals

[108]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,910

MOUND COMPANY,

Appellant,

v.

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(March 27 , 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges. PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

RIVES, C. J., Dissenting.

[108]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,910

MOUND COMPANY,

Appellant,

v.

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(APRIL 27, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges. PER CURIAM:

This second petition for rehearing and the petition for rehearing by this Court en banc are hereby DENIED.

RIVES, Circuit Judge: I dissent.

IN THE

United State Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18910

MOUND COMPANY,

Appellant,

versus

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 1, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges.

TUTTLE, Chief Judge: This is an action seeking to cause the termination of an oil and gas lease on 3,000 acres of Texas land. The lease was executed in 1915 and covered oil, gas and sulphur. The lease was amended in 1921 so as to provide for payment to Mound of "advance sulphur royalties" which escalated to $15,000 per month from and after July 1, 1924. The lessee, Texaco, Inc., in 1922 entered into a contract with Freeport Sulphur Company under which the

latter would produce sulphur on a profit-sharing agreement. Under this agreement Freeport engaged in an active program of development and mining of sulphur at Hoskin's Mound, a salt dome located on the leased tract. In the course of this development it drilled some 1,000 sulphur wells and by 1955 it had exhausted the sulphur deposits. By this time Texaco had paid from its share of the sulphur production approximately $11,500,000.00 of sulphur royalties to appellant.

In 1942, in order to make provision for ending these obligations of Texaco to continue to pay the $15,000 monthly payments after the sulphur would be exhausted, an amendment to the lease was executed. It is conceded by both parties here that at this time Texaco had fully paid its advance royalties for some 40 years in the future — until 1985. This amendment is the document that must be interpreted to determine whether the appellant is entitled to a cancellation of the oil and gas rights in the lease. The only pertinent language is:

"ARTICLE II

"It is agreed that ARTICLE SECOND of said oil, gas and mineral lease from Mound Company to . . . [Texaco] dated May 22, 1915, shall be amended to read hereafter as follows:

"'(a) On a date not later than that on which the lessee surrenders its right to mine sulphur from the Mound Company 3,000 acres and thereby is released from the obligation to make any further advance sulphur royalty payments, the lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work with due diligence, in a bona fide effort to discover oil, until oil or gas is discovered in paying quantities on the Mound Company 3,000 acres or until the lessee shall

> have drilled to the depth herein stipulated . . . At any time after drilling for oil has been started and before oil or gas is discovered in paying quantities on the Mound Company 3,000 acres, should the lessee permit more than thirty (30) days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, the lessor may at its option, unless such delay beyond thirty (30) days is caused by act of God or conditions wholly beyond the control of the lessee, terminate this lease, as to oil and gas, as to the Mound Company 3,000 acres.' "

Conceding that Texaco would not be required, under the terms of this amendment, to do anything in relation to prospecting for oil and gas until about 1986, and then only if it elected not to commence paying advance sulphur rentals again, Mound filed this suit claiming that it had elected to terminate the lease because Texaco had started "drilling for oil" and had thereafter (no production having been achieved) permitted more than 30 days to elapse without commencing "operations for the drilling of another well."

The conduct of the lessee, which Mound contends constituted "drilling for oil," and thus hastened by nearly 40 years the time when it must satisfy the 30-day clause, was the following:

By the latter part of 1949 the known sulphur deposits were being rapidly depleted.[1] Freeport determined to at-

[1] The following description of the salt dome, taken from appellant's brief seems accurate:

> "In a typical Gulf Coast piercement-type salt dome, such as Hoskins Mound, the salt core of matrix has penetrated the earth to a point near the surface. Piercement-type domes are so classified because oil production is generally around the flanks of the salt mass from strata or formations which have been pierced by the salt mass. On such domes, sulphur, if found, is discovered in the limestone caprock which is superimposed over the top of the salt."

tempt a refraction survey to ascertain, if possible, the shape and extent of the salt dome. As testified to by the Freeport Sulphur official whose responsibility it was, the following decision was made:

"Q. Would you tell the Court the story with respect to that particular well, how it came about that the well was located and who determined where it was to be located?

"A. At the time we drilled this well the mine was quite old. Most of the sulphur had been produced. We were very interested in continuing at Hoskins Mound and not overlooking some sulphur ore bodies. We hoped to find more sulphur on the edges of the dome where we hadn't previously drilled, or which were not completely explored.

"Since the dome sloped very steeply on the edges we were reluctant to drill in unknown areas for fear of missing the dome completely or being too high on the dome and not finding what we were looking for. So we decided to find out all we could about the shape of the dome by geophysical methods before we undertook to drill these edge wells, you might call them. So we conceived the idea of having a geophysical firm run a refraction seismograph test or tests on the dome and to do that we needed a well down into the salt, nearly in the center of the dome.

"So with the advance of the geophysicists and our group, we chose this well location in the middle of the dome and arranged to drill into the salt and conduct our seismic program.

"Q. You said you together with a geophysicist determined the location?

"A. Yes.

"Q. Did the Texas Company have anything to do with determining the location of this Well No. 983?

"A. No."

When this decision was made, the appellee decided that it would be valuable for it to have this survey well drilled to about 7500 feet rather than stopping at 3500 feet, which would satisfy Freeport's needs. Thereupon, an agreement was made by the two companies by which Texaco was to receive all the data uncovered by the drilling to a depth of 3,500 feet, for which it would reimburse Freeport for one-half the cost and it would pay Freeport for the entire cost of drilling below the 3,500-foot level. It was not disputed that Texaco's objective in participating in this venture was to obtain information that might enable it to determine whether oil was present on the lease.[2]

As a result of the drilling of this well, Freeport determined to drill several wells on the flank of the salt dome as now outlined by the refraction survey. These were located and drilled by Freeport to see if it could locate additional sulphur deposits. Discussions with Texaco resulted in Texaco requesting and obtaining permission to "acquire information from electrically logging and sidewall coring certain sulphur exploratory wells," which Freeport contemplated drilling. Texaco agreed to pay the cost of its logging and coring work and to reimburse Freeport for "delay rig time" caused by this work. Otherwise Freeport did the drilling at its expense. Nine of these wells were drilled by Freeport and they were electrically logged and corings were taken for the account of Texaco. This work

[2] The written agreement between the parties stated:

> "The Texas Company (hereinafter called 'Texas') is desirous of securing all the information obtained by reason of the drilling of the aforesaid well and the aforesaid geophysical survey, and in addition, Texas desires to have the aforesaid well drilling to a total depth of 7500 feet so that additional geophysical work in connection with such well can be conducted, Texas being desirous of obtaining all such information in connection with the possibility of conducting prospecting for oil and gas at Hoskin's Mound."

was completed in November, 1950. Thereafter no drilling for oil or gas has been undertaken and there has been no production of oil or gas.

Mound contends that in two of the nine wells oil was discovered in paying quantities and that the failure of Texaco to produce worked a termination of the lease; in the alternative, Mound contends that the foregoing activities of Texaco amounted to "drilling for oil" within the language of the amendment which required that thereafter such drilling must continue with due diligence until discovery of oil or gas in paying quantities and without more than 30 days delay from abandonment of one dry hole until commencement of operations for the drilling of a new well.

The trial court held against the appellant on both issues. We affirm the judgment of the trial court.

The appellant's principal argument here is that on the uncontroverted facts, set out in skeleton form above, the trial court could not find either as a fact or as a conclusion from the facts that the Appellee did not "start drilling for oil." It takes the position that the participation of Texaco in drilling the initial well in the center of the salt mound to attempt to ascertain its exact shape and extent, followed by the participation of Texaco in what was carried on by way of logging and core testing the nine peripheral wells indisputably an aid to determining the likely presence of oil and gas, constituted "drilling for oil" in the sense that when this was done this triggered the drilling clause of the lease, and Texaco must thereafter drill continuously until production was achieved.

We think, as did the trial court, that the lease can not be given such a construction.

In construing the lease, we must bear in mind that what we are to do is to determine from its language what was the intention of the parties. We must also bear in mind

that if its language is reasonably susceptible of a construction, argued for by one of the parties, that prevents a forfeiture, such construction is to be preferred to one resulting in a forfeiture. *Ryan* v. *Kent*, 36 S.W. 2d 1007 (Tex. Com. App.). See also *Decker* v. *Kirlicks*, 216 S.W. 385 (Tex. Sup. Ct.), and *West* v. *Continental Oil Co.*, 91 F. Supp. 505, aff'd. (5 Cir.) 194 F. 2d 869.

Here we start with the highly significant fact that for some 37 years the lessee would not be required, under the lease, to do *anything* relating to "prospecting" for oil. The next thing we must note is that both parties agree that the term "drilling for oil" is to be equated with the prior language which sets up the requirements which, in about the year 1986, the lessee must satisfy to prevent termination of the lease. These requirements are: "The lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work *with due diligence, in a bona fide effort to discover oil* . . ." (Emphasis added.)

In construing the requirements of prospecting and drilling for oil, imposed upon the lessee to keep the lease alive after a certain date, we must bear in mind that the parties here are assuming postures contrary to what would normally be to their interests to take. The requirements contained in Part II of the 1942 Amendment are designed as requirements that the lessee must satisfy or it will lose its lease. Ordinarily, of course, if the lessee performed any act touching on prospecting or drilling, it would be urging that such acts fully discharged these requirements. The lessor on the other hand, would normally be urging on the court that the lessee's actions failed to measure up to the specific requirements of the lease. Here the positions of the parties are reversed. The lessee is taking the position that what it has done touching on exploration and or drilling

does not measure up to what it would be required to do in order to keep the lease alive, whereas the lessor is insisting that what the lessee has done would fully satisfy the requirements imposed on the lessee to prevent termination. However we consider the language that must be construed, we find that what the lessee would be required to do to keep the lease alive was something fairly specific: (1) Begin prospecting operations by (2) putting at least one suitable drilling rig to work, and (3) continue to work with due diligence (4) in a bona fide effort to discover oil. Clearly unless all these specific requirements were met then, under the concessions here before the Court, the lessee did not "start drilling for oil."[3] It makes no difference that the good faith of the effort to discover oil may be a somewhat subjective test. That is what the parties agreed to and thus it is what they are bound by. This is not to say that the only evidence of whether there was a good faith effort to discover oil was the testimony of those making the decisions. It is to say, however, that their testimony as to the purpose of doing the admitted acts and their intent in undertaking them was admissible, and, moreover, it became a question of fact whether there was such good faith effort intended and carried out.

Clearly there are areas of activity that may be carried out by a lessee to gather information bearing on the likelihood that oil might be found on the lease that appellant could not conceivably contend satisfied the "drilling for oil" requirement. When the two minerals, sulphur and oil, have been separated and different requirements are agreed to as to the two, then obviously, if the lessee performs activities that are ambiguous in nature, i.e., such as would

[3] This requirement being a condition precedent to creation of the obligation for continuous drilling, it must be strictly complied with. See Gulf Pipeline Co. v. Nearen, 138 S.W. 2d 1065.

be permissible as to sulphur, and without effect on oil drilling obligations if carried on under the sulphur lease, but which would be of utmost significance if carried on under the oil drilling terms of the lease, then the purpose and intent of the party performing these ambiguous acts must be determined.

Here, all the oral testimony by the parties who made the decisions to drill the exploratory well and the nine peripheral wells, was to the effect that these wells were decided upon without prior consultation with and without *requiring* any cooperation from Texaco. The testimony was undisputed that Freeport Sulphur Company would have performed substantially all of these acts whether or not Texaco joined in and shared some of the expenses. Thus it is that appellant's proposition is reduced to the argument that since what Texaco participated in by deepening the center well and by logging and core testing the nine other wells drilled for sulphur exploration was what a lessee drilling for oil would also do, then this activity by Texaco *as a matter of law* must be accounted as drilling for oil.

On the other hand, there was ample testimony tendered by the appellee to the effect that what it did in obtaining this kind of information from all available sources was what the owner of an oil lease would do, *preliminary* to drilling for oil.

Bearing in mind that under the contract appellee would not have to do anything relating to prospecting for oil until the year 1986, and bearing in mind that the lessor, as well as the lessee, could not possibly be injured but both would be positively benefitted by any fact finding surveys the lessee was willing to make at its expense and with no obligation to do so, short of "drilling in a bona fide effort to discover oil," we are fully convinced that the trial court could find that the contract required something more than

was actually done here to trigger the 30-day clause. We also conclude that the trial court could find as a fact that the lessee did not intend to start on a bona fide effort to discover oil. In this connection we use the term "bona fide effort" as meaning the kind of effort that lessee in 1986 would be called upon to exert to keep the oil lease in effect.

We can not believe that if Texaco were here offering such actions as it here performed, i.e., riding at least partially free on drilling done for the purpose of discovering additional sulphur deposits in wells placed appropriately for sulphur discoveries and logging and core testing such sulphur wells, the appellant would agree that this constituted a full performance of its obligation to drill with due diligence in a bona fide effort to discover oil so as to keep the lease alive. Moreover, we do not believe a Texas Court would hold that such activities would satisfy such requirement. Much less should a court find this to be so where a forfeiture of the oil lease is sought on the basis of such a finding.

In concluding that the ambiguous actions taken by Freeport and Texaco are subject to explanation by the parties who made the decisions, we do not overlook the proposition asserted by appellant that when subjective intent must be determined as a fact, all facts and circumstances must be looked to to enable the fact finder to make this determination and not just the secretly held purpose or intent of the actor. *Stitz* v. *National Producing & Refining Co.*, 247 S.W. 657; *Jordan Drilling Co.* v. *Starr*, Tex. Civ. App., 232 S.W. 2d 149. Certainly, however, where conduct is ambiguous as here there is no rule of law that excludes the testimony of the actor touching on the question: which purpose or intent did he have in performing the specified acts?

We next come to the second argument of appellant that in two of the peripheral wells oil in paying quantities was

actually discovered; and that failure to *produce* such oil automatically terminated the separate lease on 2500 of the 3000 acres. The nature of the proof that there was actual discovery was opinion testimony of experts based on an analysis of the electrical logs and the cores taken from two of the wells. The trial court considered the opinions that there was oil in paying quantities too speculative for it to accept in light of expert testimony from other witnesses that it would be impossible to conclude with any degree of certainty that such quantities were present on the basis of the hypothetical questions presented. It is clear that the trial court felt that the inability of the witnesses to estimate probable production in number of barrels greatly weakened their testimony. Appellee cites the Texas case of *Union Sulphur Co.* v. *Texas Gulf Sulphur Co.*, 42 S.W. 2d 182, as supporting the trial court's view that only actual production could prove the existence of minerals in paying quantities. While we do not feel prepared to conclude that the Texas courts have gone this far, it is nevertheless true that the weight to be given to opinion evidence is a matter for the trial court's determination. The trial court is not bound by the opinion evidence of experts even when uncontradicted. *New York Insurance Co.* v. *Johnston*, 5 Cir., 256 F. 2d 115; *Western Canada Steamship Co.* v. *United States*, 9 Cir., 245 F. 2d 921; *Arena Co.* v. *Minneapolis Gas Co.*, 8 Cir., 234 F. 2d 451. Moreover, here there was opinion evidence to support the trial court's finding that the appellant had failed to carry its burden of proving discovery in paying quantities.

We conclude that the judgment of the trial court was amply supported in fact and law. It is, therefore,

AFFIRMED.

RIVES, Circuit Judge, dissenting:

Both parties agree that the 1942 amendment defines "drilling for oil" in terms of prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil. With that definition in mind, it seems to me that the undisputed evidence established that drilling for oil was started. Texaco contends that no oil or gas in paying quantities was discovered and I would agree with the finding of the district court to that effect. Nonetheless, when Texaco permitted more than 30 days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, Mound Company had an option to terminate the lease as to oil and gas. If the option existed, it was unquestionably exercised. The clear duty of the Court is to hold the parties to the terms of the agreement which they executed. With deference to the district court and to my brothers, the case appears that simple to me.

I therefore respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana, Apr. 30, 1962